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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-154

HOWARD PIPER, THOMAS F. PIPER

AND

WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the Pipers") respectfully pray that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Second Circuit, which reversed a judgment dismissing a complaint against them after trial.

Opinions Below

The opinion of the Court of Appeals, not yet officially reported, is reported at CCH Fed. Sec. L. Rep. ¶ 93,816 at p. 93,491. It reviewed, on a consolidated appeal, three

decisions of the United States District Court for the Southern District of New York, reported at 331 F.Supp. 1154, 337 F.Supp. 1128 and 337 F.Supp. 1147, respectively. An earlier decision of the Court of Appeals *en banc*, reported at 426 F.2d 569 (2 Cir. 1970), affirmed and remanded the District Court's denial of a motion for preliminary injunction, reported at 303 F.Supp. 191 (S.D.N.Y. 1969).

These opinions are reprinted in full in a separate Joint Appendix submitted herein. This petition relates solely to the reversal of the District Court's dismissal of the complaint against the Pipers in the opinion reported at 337 F. Supp. 1128. The Pipers were not parties to either of the other two actions heard on the consolidated appeal.

Jurisdiction

The judgment of the Court of Appeals was entered March 16, 1973 and its denial of the Pipers' timely petition for rehearing and suggestion for rehearing *en banc* was entered April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. This case presents a number of interrelated questions of law not yet considered by this Court under Section 14(e) of the Securities Exchange Act of 1934, adopted as part of the "Williams Act" in 1968, including:

a. Does a person making a tender offer have standing to sue for damages—as distinct from injunctive relief—for alleged misstatements made by management of the target corporation in opposing the tender offer if the tender offeror does not claim to have been misled by the statements?

b. What is the proper standard under Section 14(e) for determining the "materiality" of an alleged misstatement by management in a suit by the tender of-

feror rather than the shareholders of the target corporation?

c. Can the Court, in a suit for damages by the tender offeror, conclusively presume reliance by non-tendering shareholders of the target corporation (holding almost 20% of the outstanding stock) on an allegedly material misrepresentation by management?

d. Can the Court conclusively presume a causal connection between such misrepresentation and failure of the tender offeror to get control of the target corporation seven months later?

e. Can management, which opposes a tender offer in good faith, be held personally liable for damages because months after their alleged misrepresentations in connection with a tender offer, another company makes an offer to the shareholders and ultimately succeeds in acquiring control of the target corporation through acts in which management of the target corporation had no participation?

2. In addition to these questions of law, and on the facts of this case, did the Court of Appeals err in disregarding the findings of the trial court and concluding, contrary to the record, that the statements made by petitioners were materially misleading, were relied upon by shareholders and therefore presumably prevented plaintiff from purchasing additional shares thus causing injury to plaintiff, and then directing on remand that petitioners be held personally liable under Section 14(e)?

Statute Involved

Section 14(e) of the Securities Exchange Act of 1934 ("the 1934 Act"), as amended July 29, 1968, 15 U.S.C. § 78n(e), provides:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state

any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."*

Statement of the Case

On January 23, 1969 Chris-Craft Industries, Inc. ("CCI"), plaintiff below, announced a cash tender offer at $65 per share for up to 300,000 shares of common stock of Piper Aircraft Corporation ("Piper Aircraft"). By that date, CCI had already secretly accumulated over 200,000 shares through open market purchases, beginning late in December 1968, and a negotiated transaction with a mutual fund at $65 per share consummated on January 22, 1969 (Jt. App. H-10).** At the time of the offer, Piper Aircraft common stock was selling for about $52.50 on the New York Stock Exchange (*ibid.*).

In its published tender offer, which was to remain open until February 3, 1969, CCI stated that the purchase was being made "for investment with a view to control" of Piper Aircraft but that CCI "does not presently have any specific plan or proposal . . . to acquire control" of Piper Aircraft (EV. 716; EV. 710).

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* After the events complained of in this action, Congress, by Public Law 91-567 adopted December 22, 1970, added the following sentence to Section 14(e): "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

** The opinions below are reproduced in the separate Joint Appendix filed herein and referred to as "Jt. App." References to ". . . A" are to the pages of the Appendix filed in the Court of Appeals. References to "EV. . . ." are to the pages of the volumes containing exhibits filed in the Court of Appeals.

Upon receiving notice of CCI's offer, the management of Piper Aircraft, whose Board of Directors consisted of eight members of which the Pipers comprised only three (214A), immediately sought advice from several outside advisors (Jt. App. H-10).

Thereafter the Board of Directors of Piper Aircraft adopted a resolution opposing the CCI tender offer as "not in the best interests" of the shareholders of Piper Aircraft (Jt. App. H-11). This opinion of Piper Aircraft's Board was then communicated to the Piper Aircraft shareholders in a letter sent over the signature of W. T. Piper, Jr., one of the petitioners herein, who was President of Piper Aircraft at the time (242A; Jt. App. H-11). As was normal in situations of this kind, Piper Aircraft also began contacting other companies in an effort to find a company that might be a better alternative than CCI (Jt. App. H-39).* Among the companies contacted was Grumman Aircraft Engineering Corporation ("Grumman"), a company with which Piper Aircraft was familiar and with which it had had previous satisfactory business relationships (2056A-2057A).

Negotiations between Grumman and Piper Aircraft ensued and as a result, on January 29, while CCI's tender offer was outstanding, Grumman and Piper Aircraft announced that Grumman "had agreed to purchase 300,000 shares of Piper Aircraft Corporation's authorized but unissued common stock at $65 per share," that the agreement was subject to the approval of the respective Boards of Directors and that it was also subject to various other

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* As Manuel F. Cohen testified in 1968 while he was Chairman of the SEC: "There has been enough experience in the past 2 years for any sophisticated takeover bidder to know that, unless management joins him, management will seek another partner and that other partner probably will make a slightly better offer." *Hearings on H.R. 14475, S.510 Before the Subcomm. on Comm. and Fin. of the House Comm. on Interstate and Foreign Commerce,* 90th Cong., 2d Sess., at 22 (1968).

conditions (266A-267A). The announcement was mailed to shareholders on the day it was released (Jt. App. H-12).

One of the numerous terms in the agreement, which was not specifically referred to in the announcement, was that the agreement could be terminated by either party should further negotiations looking to a merger of the two companies prove unfruitful. If the agreement were terminated, Piper Aircraft agreed either to find another buyer or to return the consideration paid by Grumman plus nominal interest of 3½% from the date of closing (261A-262A).

Both the District Court (Jt. App. G-12) and the Court of Appeals (Jt. App. H-39) found that the agreement with Grumman was not a "sham" as CCI contended and that the repurchase provision was a "rational and logical part of the agreement" (*ibid.*).

One result of the Grumman announcement was that the price of Piper Aircraft shares declined while CCI's tender offer was still outstanding (Jt. App. H-114, n. 3). At the close of CCI's offer on February 3, CCI received 304,606 shares of Piper Aircraft, giving it a total of 547,106 shares, or about 33% of the outstanding shares (Jt. App. H-12). Thereafter, CCI decided to seek control of Piper Aircraft by making an exchange offer to shareholders, offering a package of CCI securities for shares of Piper Aircraft stock. The value of the securities package offered by CCI in its exchange offer was estimated to be between $70 and $74 per share of Piper Aircraft stock (Jt. App. H-12-13). This was about 10% more than CCI had offered in its cash tender offer.

The Grumman agreement was terminated on March 19, 1969 after the New York Stock Exchange refused to list the shares for reasons not pertinent here (Jt. App. H-12). Although the management of Piper Aircraft continued to search for a better alternative than CCI, nothing that either

Piper Aircraft or the Pipers did thereafter had any effect on CCI's efforts to acquire control of Piper Aircraft. The events in January just recited were the sole basis upon which the Court of Appeals found the Pipers liable to CCI for damages because CCI failed to acquire control of Piper Aircraft seven months later by a "narrow margin" (Jt. App. H-63).*

Both the District Court (Jt. App. G-7) and the Court of Appeals (Jt. App. H-18) found that CCI lost its opportunity to acquire control of Piper Aircraft in September 1969, more than seven months after Piper Aircraft's letters and press release. That was when Bangor Punta Corporation ("BPC"), through open market cash purchases, acquired sufficient shares of Piper Aircraft stock to give it over 50% of the outstanding shares.

Proceedings Below

On May 22, 1969 CCI commenced this action in the United States District Court for the Southern District of New York alleging violations of Section 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e(c), and Rule 135 promulgated thereunder, as well as Sections 9, 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j(b) and 78n(e), and Rules 10b-5 and 10b-6 promulgated under that Act.

On July 22, 1969 CCI moved to enjoin BPC from proceeding with an exchange offer to all shareholders of Piper Aircraft. The motion was denied in August 1969 (Jt. App. A-1 et seq.). The denial of the injunction was affirmed by the Court of Appeals for the Second Circuit in an *en banc* decision in April 1970 (Jt. App. B-1 et seq.), but the Court of Appeals disagreed with the District Court's analysis of

* Although the Court of Appeals decision refers to the Pipers throughout as "the Piper family," these three defendants and their wives owned only about 150,000 shares of the 501,090 owned by all members of "the Piper family" together (EV. 146, 170).

the applicable law and remanded the action to the District Court for proceedings not inconsistent with its opinion.

In March 1971 CCI's action was tried before Judge Milton Pollack of the Southern District of New York sitting without a jury.* After trial, Judge Pollack concluded that the statements made by Piper Aircraft in opposing CCI's tender offer in January 1969 were not misleading and caused no injury to CCI. The Court of Appeals reversed, holding that the statements were materially misleading and (2 to 1) that the Pipers were jointly and severally liable with the other defendants for damages to CCI under Section 14(e).

The Court of Appeals remanded the case with explicit directions to award damages based on "the reduction in the appraisal value of CCI's Piper [Aircraft] holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time" (Jt. App. H-69).

In dissent as to the Pipers' liability, Judge Walter Mansfield agreed with the District Court's conclusion that the Pipers were not liable to CCI since CCI failed to show that it was damaged by the statements in January 1969. The statements were made in opposition to CCI's limited cash tender offer, on which it received more shares than it solicited. He further agreed with the District Court that the statements did not injure CCI in the subsequent contest for control of Piper Aircraft between CCI and BPC (Jt. App. H-112-116).

The statements found by the Court of Appeals to violate Section 14(e) were expressions of opinion by the Piper Aircraft Board of Directors. In their view the CCI

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* Judge Pollack also tried two other related actions at the same time. One by BPC against CCI and one by the SEC against BPC. Neither Piper Aircraft nor the Pipers were parties to either of those actions.

cash tender offer of January 1969 was "inadequate and not in the best interests of Piper's shareholders" (Jt. App. H-37). The Court of Appeals found that calling the offer "inadequate" was materially misleading because the tender offer price of $65 per share was considerably higher than the current market price for Piper Aircraft stock (then about $52 per share) (Jt. App. H-38). The District Court had concluded (i) that the word "inadequate" did not refer solely to price and (ii) even assuming it referred only to price, the statement "would be more fatuous than misleading" because "[a]ny Piper shareholder with a telephone or a newspaper at hand could compare the current market for Piper shares with Chris-Craft's offer" (Jt. App. G-11).

The Pipers were also found liable for the press release issued by Piper Aircraft announcing the agreement with Grumman. Liability flowed, according to the Court of Appeals, because the release did not say that Grumman could [illegible]" the stock back to Piper Aircraft if the negotiations were terminated (Jt. App. H-39). The trial court found the omission in the press release inconsequential, concluding that Grumman's right to resell was not a "sham" but a rational part of the agreement (Jt. App. G-12). The Court of Appeals agreed that the resale provision was "rational and logical" and "not a sham" but nevertheless concluded that the omission of a reference to it in the press release was materially misleading (Jt. App. H-39).

The trial court, which had the opportunity to observe the witnesses, rejected as "unfounded" CCI's contentions that Piper Aircraft's resistance to its tender offer caused any injury to CCI (Jt. App. G-14). The Court of Appeals, while piously disclaiming that it was finding the District Court clearly erroneous, nevertheless reversed. It concluded that the statements reflected "culpability," held that the Pipers violated "a high fiduciary duty of honesty

and fair dealing," had "obviously disregarded" a "special responsibility to be meticulous and precise in their representations to shareholders" and had "recklessly disregarded [their] obligation to shareholders in failing to disclose with substantial accuracy" all the terms of the Grumman agreement (Jt. App. H-38, H-40). By using invective the Court of Appeals totally disregarded the "unless clearly erroneous" test applicable on review, although professing to have no disagreement with the District Court's findings of fact (Jt. App. H-37).

In its January tender offer CCI solicited "up to 300,000 shares." As Judge Mansfield pointed out, "the district court found that [CCI] was not seeking more." (Jt. App. H-113). In fact, 304,606 shares were tendered to it (Jt. App. H-12), and as Judge Mansfield noted in his dissent, CCI "did not have sufficient funds to purchase any significant amount [of shares] in excess of 300,000" (Jt. App. H-113).

The Court of Appeals majority nevertheless indulged in a series of presumptions, all contrary to the facts of record, and found it a "reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares" (Jt. App. H-62). The dissenting judge, relying on this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970) that "damages should be recoverable only to the extent that they can be shown," rejected the majority's presumptions and concluded that CCI had failed to show any loss because it "got more shares than it agreed to buy" (Jt. App. H-113).

None of the other violations of Section 14(e) found by the Court of Appeals involved the Pipers. They took place after BPC decided to acquire control of Piper Aircraft for itself in May 1969. The Pipers were nevertheless held jointly and severally liable for all damages to CCI because the majority presumptively concluded—without any support in the record—that the January statements "most likely had a continuing adverse effect on CCI's attempts to acquire

Piper [Aircraft] shares" (Jt. App. H-62). The dissenting judge found this conclusion a "fanciful assumption" amounting to "rank speculation" (Jt. App. H-115).

The majority rejected the District Court's conclusion that CCI "had failed to prove its claim for damages" (Jt. App. H-6). It held, instead, that "considering the narrow margin of victory" by BPC, the January statements "denied to CCI a fair opportunity to win the contest for control" (Jt. App. H-63). The Pipers were therefore held jointly and severally liable with BPC because they "contributed to the success of BPC's takeover attempt," even though the statements were made long before BPC entered the contest (Jt. App. H-69).

Moreover, the Pipers were found personally liable and Piper Aircraft was absolved of liability because, concluded the majority without any evidence to support it, the Pipers "acted not on behalf of the corporation in commiting their illegal acts, but in their own individual interests" (Jt. App. H-68, n. 31). In this regard the majority ignored the undisputed fact—indeed, their own findings—that the statements were those of the Piper Aircraft Board of Directors (Jt. App. H-11) and rejected the District Court's finding that the January statements were made by Piper Aircraft's management (Jt. App. G-11).*

Reasons for Granting the Writ

This case presents, as the Court of Appeals found, "important questions, some of first impression, involving the antifraud provisions of the federal securities laws in their application to a contest for acquisition of a controlling stock interest in a target corporation."** More specifi-

* CCI's complaint named five of the eight men on the Board of Directors of Piper Aircraft. Service of process, however, was effected only on the three Pipers, petitioners herein.

** This Court has in the past granted certiorari in cases such as this where the question was "an important one of first impression." See, *e.g., American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964).

cally, it is vitally important to businessmen as well as to courts dealing with tender offers to get guidance from this Court as to "the scope of liability and relief under Section 14(e) of the Securities Exchange Act of 1934" (Jt. App. H-6).

"The cash tender offer has become an increasingly favored method of acquiring control of publicly held corporations." H.R. Rep. No. 1711, 90th Cong. 2d Sess. 2 (1968). Virtually every week newspapers report on contested tender offers. Courts have been struggling in the last several years in attempts to find the proper interpretation of the provisions of the Williams Act. Some cases have sought to define who has standing under it.* Other cases have sought to define its terminology.** The Court of Appeals

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* See, *e.g.*, *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687, 695–96 n. 14 (2 Cir. 1973); *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n. 1 (2 Cir. 1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 944-46 (2 Cir. 1969); *H.K. Porter Co.* v. *Nicholson File Co.*, 353 F.Supp. 153, 162-64 (D.R.I. 1972); *Cattlemen's Investment Co.* v. *Fears*, 343 F.Supp. 1248, 1252 (W.D. Okla. 1972); *Washburn* v. *Madison Square Garden Corp.*, 340 F.Supp. 504, 508-09 (S.D.N.Y. 1972); *Emmi* v. *First-Manufacturers National Bank*, 336 F.Supp. 629, 636 (D. Me. 1971); *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890, 914 (D. Me. 1971); *Grow Chemical Corp.* v. *Uran.*, 316 F.Supp. 891, 892 (S.D.N.Y. 1970); *Fabrikant* v. *Jacobellis*, CCH Fed. Sec. L. Rep. ¶ 92,686, at 99,017-18 (E.D.N.Y. June 3, 1970); *Neuman* v. *Electronic Specialty Co.*, CCH Fed. Sec. L. Rep. ¶ 92,591, at 98,703, 98,705 (N.D. Ill. Dec. 31, 1969).

** The following cases have discussed other aspects of § 14(e): *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687, 695-97 (2 Cir. 1973); *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843-44 (2 Cir. 1970); *Susquehanna Corp.* v. *Pan American Sulphur Co.*, 423 F.2d 1075, 1085-86 (5 Cir. 1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41, 949-52 (2 Cir. 1969); *Sonesta International Hotels Corp.* v. *Wellington Associates*, CCH Fed. Sec. L. Rep. ¶ 94,007 (S.D.N.Y. May 28, 1973); *General Host Corp.* v. *Triumph American, Inc.*, CCH Fed. Sec. L. Rep. ¶ 93,946 (S.D.N.Y. Apr. 2, 1973); *Mosinee Paper Corp.* v. *Rondeau*, 354 F.Supp. 686, 696-97 (W.D. Wis. 1973); *H.K. Porter Co.* v. *Nicholson File Co.*, 353 F.Supp. 153, 162-65 (D.R.I. 1972);

in this case has gone further than any previous court in applying the Williams Act to the unsuccessful offeror.

As Judge Friendly observed in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969): "Probably there will no more be a perfect tender offer than a perfect trial." The result of the decision of the Court of Appeals will be to open the federal courts to a flood of litigation by unsuccessful contestants for corporate control, each claiming that in some way their opponents violated Section 14(e). Exclusive jurisdiction under Section 14(e) is conferred on the federal courts by Section 27 of the 1934 Act (15 U.S.C. 78aa). The Court of Appeals, by engrafting the common law tort concept of "interference with a prospective advantage" onto Section 14(e) (Jt. App. H-30), invites suits that have heretofore involved traditional state law tort claims. They will now be entitled to be heard in the federal courts under the guise of a securities law violation.

In addition, the decision below will have a profound negative effect on the management of every publicly held corporation that is the target of a limited tender offer. Indeed, the decision effectively tips the balance in favor of the offeror and against management, contrary to the ex-

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Washburn v. *Madison Square Garden Corp.*, 340 F.Supp. 504, 508-09 (S.D.N.Y. 1972); *Dyer* v. *Eastern Trust and Banking Co.*, 336 F.Supp. 890, 907-09, 913-14 (D.Me. 1971); *Emmi* v. *First-Manufacturers National Bank*, 336 F.Supp. 629, 636-137 (D. Me. 1971); *Smith* v. *Newport National Bank*, 326 F.Supp. 874, 878 (D.R.I. 1971); *Fabrikant* v. *Jacobellis*, CCH Fed. Sec. L. Rep. ¶ 92,686, at 99,017-18 (E.D.N.Y. June 3, 1970); *Neuman* v. *Electronic Specialty Co.*, CCH Fed. Sec. L. Rep. ¶ 92,591, at 98,705-06 (N.D. Ill. Dec. 31, 1969); *Metro-Goldwyn-Mayer, Inc.* v. *Transamerica Corp.*, 303 F. Supp. 1344, 1353 (S.D.N.Y. 1969); *Armour & Co.* v. *General Host Corp.*, 296 F.Supp. 470 (S.D.N.Y. 1969). In addition, other cases have discussed other sections of the Williams Act. See, *e.g.*, *GAF Corp.* v. *Milstein*, 453 F.2d 709 (2 Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (§ 13(d)); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7 Cir. 1970) (§ 13(d)); *Cattlemen's Investment Co.* v. *Fears*, 343 F.Supp. 1248, 1251-52 (W.D. Okla. 1972) (§ 14(d)).

press intent of Congress.* "Incumbent management," as Mr. Justice White recently noted, has a number of tactics available "in its arsenal of anti-tender . . . weapons," among them "to exhort shareholders not to tender." *Kern County Land Co.* v. *Occidental Petroleum Corp.*, ___ U.S. ___, 93 S. Ct. 1736, 1746 n. 29 (1973). Calling a tender offer "inadequate" seems a mild exhortation at best, yet the Pipers have been found personally liable for damages claimed to be in the millions by CCI for doing so, even though in fact more shares were tendered than were solicited.** The effect of this decision, if left standing, will be to compel management to remain silent in the face of a tender offer by a company honestly believed to be unsuitable, rather than run the risk of being subjected to catastrophic personal liability (CCI here seeks over $40 million in damages) if years later a court should find some exhortation to have been misleading. If such is to be the law, we submit that it should be so declared by this Court.

Review should be granted at this time, notwithstanding the remand, since the Court of Appeals has preempted the customary right of the trial court to determine the scope of relief in the first instance. Completely disregarding the trial court's finding that CCI did not "establish a nexus between the violations it charges and the damages it claims" Jt. App. G-23), two of the judges mandated that a damage award be entered against the Pipers (Jt. App. H-68-69).***

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* "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

** The Court of Appeals majority said this fact showed the "fairness of the offer . . . despite the misrepresentations" (Jt. App. H-62). The dissent said it showed "[n]o loss was suffered" by CCI (Jt. App. H-113). We submit it shows that the "misrepresentations" were not "material."

*** It is scarcely persuasive to say, as the Court of Appeals majority did, that it was required to determine the scope of relief because the trial court had not done so, when the trial court had no reason to do so because it found for defendants on liability (Jt. App. H-67).

By so doing the majority decision—it was on this very point that Judge Mansfield dissented (Jt. App. H-112-113)—totally disregards this Court's clear holding in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970) that "damages should be recoverable only to the extent that they can be shown." Thus, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

A. The "Standing" Issue

Awarding money damages to an unsuccessful tender offeror works no benefit to the stockholders of the target corporation, though granting the offeror the right to seek injunctive relief against management might.**

To the Court of Appeals majority, the standing issue turned on the closeness of the contest between CCI and BPC. Judge Timbers found that CCI had standing here "because of the wrongdoing of its opponent and the margin of victory is only 7%" (Jt. App. H-32). Judge Gurfein said that "[s]ince the seven per-cent illegally acquired by BPC caused it to win the contest, the loser has standing" (Jt.

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* Bangor Punta Corporation and The First Boston Corporation, defendants below, are also petitioning this Court for certiorari. Rather than duplicate the grounds in their petitions, some of which are equally applicable to the Pipers, we respectfully refer the Court to those petitions.

** CCI never sought to enjoin the January statements during its tender offer, and we do not here challenge those cases which suggest that standing to seek injunctive relief would exist. *E.g., Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842 (2 Cir. 1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (2 Cir. 1969); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7 Cir. 1970). Granting standing to seek injunctive relief, but not money damages, has been held proper under Rule 10b-5. *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2 Cir. 1967). We submit that the legislative history of Section 14(e) mandates a similar result.

App. H-95).* Such a criterion makes each case *sui generis* on the standing issue, depending on the results of the contest. In this case, moreover, it means that CCI's standing to sue the Pipers for the January statements turns on the outcome of the contest between CCI and BPC, which began in May, four months after the statements were made. Had BPC not sought control of Piper Aircraft or had it failed, CCI would not have had standing to sue the Pipers under the majority's theory. The results of CCI's cash tender offer were not even close—CCI obtained more shares than it solicited and, as Judge Mansfield noted, as many as it could afford to buy (Jt. App. H-113).

Judge Mansfield's dissenting opinion would apparently give all tender offerors standing to sue under Section 14(e), leaving damages to be determined by principles of reliance and causation (Jt. App. H-107-110). This approach, while it would dispose of the issue for all future cases, overlooks the non-compensatory, punitive nature of the award. Giving tender offerors standing to sue for damages when they do not claim to have been misled will "assess many millions of dollars of damages in the form of a bail-out" of the unsuccessful offeror (Jt. App. G-36). Lawsuits by losers of control fights will be brought in the hope that a court (here not the trial court but the Court of Appeals) will eventually save them by finding that something in an opponent's statements during the tender offer was misleading. We submit Section 14(e) was never intended as a tool for such a result and it should not be so construed.

The result reached by the majority below is particularly egregious with respect to the Pipers. They were held liable to CCI because, the majority said, shareholders pre-

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* Judge Gurfein also said that "a defeated contender who won a booby prize of say, one per-cent of the stock, would have standing simply because he entered the lists and lost." In context, there would appear to have been a typographical error in the omission of the word "not" between "would" and "have" (Jt. App. H-95).

sumptively did not tender to CCI at $65 per share because that price was called inadequate. Both the trial court and the Court of Appeals found, however, that subsequently shareholders were offered more per share by both CCI and BPC (Jt. App. G-11; Jt. App. H-13, H-17). Thus, an honest opinion borne out by subsequent events that a $65 offer was inadequate has been converted by the Court of Appeals into a "materially misleading" statement, knowingly made (Jt. App. H-38).

B. The "Materiality," "Reliance," "Causation" and "Proof of Damage" Issues

In holding that the Piper Aircraft statements were materially misleading, were presumed to have been relied on by Piper Aircraft stockholders and presumably caused injury to CCI, the Court below applied principles in conflict with this Court's decisions in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

Neither *Mills* nor *Affiliated Ute* involved a plaintiff, like CCI, who concededly did not rely on misstatements, who did not prove that he was injured by them, but who nevertheless claimed to be entitled to damages because a third party allegedly relied on them. In these circumstances, the District Court said, CCI should not be entitled to have the court "disregard traditional requirements that causal connection be shown between the claimed violation and the injury" (Jt. App. G-20). The Court of Appeals agreed with the District Court "that CCI failed to show with reasonable certainty that it would have obtained a controlling position in Piper [Aircraft] had it not been for the violations of the securities laws" by the defendants (Jt. App. H-56).*

* There is an inherent inconsistency between the acknowledgement that CCI failed to show that it would have obtained control and the award to CCI of damages based on the fact that it only obtained a minority position. The judgment for defendants should have been

Nevertheless, since "BPC itself obtained control through its violations of the securities laws" (*ibid.*), the Court of Appeals held not only that "CCI need not show that it relied upon the deception" but that reliance by the Piper Aircraft stockholders had to be "presumed" under *Mills* and *Affiliated Ute* (Jt. App. H-56-59).

We submit that no such "presumption" should be indulged in where a limited tender offer is involved and the tender offeror receives more shares than he solicited.

If "reliance" is to be presumed from the "materiality" of the alleged misstatement, surely a court, in applying the "reasonable investor" test of *Affiliated Ute*, should be required to look at what the investors in this case actually did. Here, they tendered more shares than CCI wanted.

Any stockholder who is "presumed" to have relied on the January statements by not tendering his shares to CCI for $65 could only have benefitted by remaining eligible for the subsequent higher offers. Nevertheless, although the District Court found that the January statements reflected management's "efforts to procure a better alternative for Piper [Aircraft] shareholders," which "efforts were made and were, in terms of price to tendering shareholders, successful," (Jt. App. G-12), the Court of Appeals ignored this finding. Rather than considering the shareholders, for whose protection Section 14(e) was enacted, the Court of Appeals presumed that "CCI was unlawfully denied the

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affirmed on this finding alone, just as the common law tort actions for interference with a prospective advantage referred to by Judge Timbers (Jt. App. H-30) would have been dismissed for failure to prove that, absent the "interference," plaintiff would have obtained his goal. *E.g., Lewis* v. *Bloede*, 202 Fed. 7, 17 (4 Cir. 1912); *Harrison* v. *Prather*, 435 F.2d 1168, 1172 (5 Cir. 1970); *Zoby* v. *American Fidelity Co.*, 143 F.Supp. 763, 769 (E.D.Va. 1956); *Vendall, Inc.* v. *Statler Manufacturing Corp.*, 5 A.D.2d 882, 171 N.Y.S.2d 938 (2d Dept. 1958); *Chicago Title Insurance Co.* v. *Great Western Financial Corp.*, 69 Cal.2d 305, 319, 444 P.2d 481, 490, 70 Cal. Rptr. 849, 901-02 (1968).

opportunity to purchase additional shares" (Jt. App. H-62).

The presumption that but for the misstatements CCI might have obtained even more shares is simply too speculative a basis on which to conclude that the alleged misstatements were "material" and that therefore both "reliance" by Piper Aircraft shareholders and injury to CCI could be "presumed."

Judge Mansfield's dissent viewed the matter as a problem of proof of damages. Noting this Court's determination in *Mills* that, despite the finding of reliance, "damages should be recoverable only to the extent that they can be shown" (396 U.S. at 375), he concluded "CCI did not suffer any damages" as a result of the January communications (Jt. App. H-116). The majority apparently disagreed and mandated a damage award. Judge Timbers' only answer to Judge Mansfield's position, however, was the vague speculation—with no support in the record—that the January statements "most likely had a continuing adverse effect" on CCI during its subsequent battle with BPC (Jt. App. H-62). This unsupported conjecture is insufficient. "[D]amages," as Mr. Justice Brandeis said, "must be proved by facts from which their existence is logically and legally inferable" and "cannot be supplied by conjecture." *Keogh* v. *Chicago & Northwestern Ry.* 260 U.S. 156, 165 (1922).

In short, clearer definitions are needed from this Court of the proper relationship of the elements of "materiality," "reliance," "causal connection" and "proof of damage" under Section 14(e) in the context of tender offers. The best evidence of this need is the dispute between the judges of the Court below. What is to be a "rebuttable presumption," what a "conclusive presumption" and what no presumption at all but a matter of real proof? (Jt. App. H-109).

C. The "Scienter" Issue

Section 14(e) is a penal statute prohibiting "fraudulent, deceptive, or manipulative acts or practices." The three separate opinions in the Court of Appeals on the "scienter" issue reflect significant differences between the judges as to what standard of evil intent applies.* Imprecise labels abound. The label used by the Court of Appeals to describe the January statements was a failure "to be meticulous and precise" (Jt. App. II-38). That is a far cry from "fraudulent, deceptive, or manipulative" and, we submit, an improper standard on which to impose personal liability on incumbent management for resisting what they honestly believed was an undesirable corporate takeover. "[I]n contests for control the management has a role to play as such and not merely insofar as the managers are stockholders." *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 695 (2 Cir. 1966). How can investors expect incumbent management to advise them at all if words such as "inadequate" are to be the basis for imposition of staggering personal liability?** The decision below as to the Pipers emasculates the role Congress intended incum-

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* The Circuits have been split for years on the same issue under Section 10(b) and Rule 10b-5. See the extensive discussion in Judge Adams' opinion in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 281-288 (3 Cir.), *cert. denied* 409 U.S. 874 (1972). The Second Circuit itself is currently not unanimous as to scienter under Section 10(b), see *Lanza* v. *Drexel & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,959 (2 Cir. April 26, 1973), and has recently compounded the confusion by applying a different standard under Section 14(a). *Gerstle* v. *Gamble-Skogmo, Inc.*, CCH Fed. Sec. L. Rep. ¶ 93,983, at 93,940-42 (2 Cir. May 9, 1973).

** In adopting Section 14, Congress noted that cash tender offers are "usually at a price above the current market price." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2 (1968). Yet the Pipers have been held personally liable for failure to point out this notorious fact. Indeed, calling a cash tender offer inadequate is one method frequently used to oppose such offers. As Judge Duffy held in *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.*, 350 F.Supp. 1066, 1071 (S.D.N.Y. 1973), "the adequacy or inadequacy of price is subjective."

bent management to play in these contests and should be corrected by this Court.

D. The Scope of Appellate Review Issue

In reversing the judgments for defendants entered by the trial court, the Court of Appeals did not apply the "clearly erroneous" test of Rule 52(a) F.R.C.P., because it said that its "disagreement with the district court on whether defendants have violated Section 14(e) does not go to its findings of fact, as to which the 'unless clearly erroneous' test applies, but to its application of the legal standards...." (Jt. App. H-37). In reality, the Court of Appeals reversed the following findings of the trial court pertinent to the Pipers:

1. The finding that the word "inadequate" in the January letters referred to factors other than price (Jt. App. G-11-12). The Court of Appeals, while not holding the trial judge clearly erroneous, disagreed and said "the reference was to price" (Jt. App. H-38).

2. The finding that CCI failed to prove that it was injured by the January statements (Jt. App. G-11-14, G-36-37). The Court of Appeals (2 to 1) indulged in a wholesale series of presumptions and, contrary to the record, concluded that CCI was entitled to damages (Jt. App. H-61-62).

3. The finding that the resistance to CCI's tender offer in January 1969 was by the management of Piper Aircraft (Jt. App. G-11-12). The Court of Appeals refused to permit the District Court to consider the question and instead determined on its own that the Pipers were acting "not on behalf of the corporation" but "in their own individual interests" (Jt. App. H-68, n. 31).

4. The undisputed fact that CCI made its tender offer in January 1969 expressly stating that it "does

not have any specific plan or proposal . . . to acquire control of Piper" Aircraft (EV. 716; EV. 710). The majority of the Court of Appeals panel, however, based their decision on their own finding that "CCI had decided by the time of the cash tender offer that its objective was to win control of Piper [Aircraft]" (Jt. App. H-61).*

These determinations by the Court of Appeals were not merely of "ultimate fact." Credibility issues based on oral testimony were involved.** Taken as a whole the Court of Appeals opinion reflects the majority's substitution of its own factual findings for those of the trial judge who saw and heard the witnesses. Other circuits have not been so cavalier. They have consistently applied the "clearly erroneous" test when reviewing District Court decisions in this area of the law. See, *e.g.*, *Susquehanna Corp.* v. *Pan American Sulphur Co.*, 423 F.2d 1075, 1084, 1086 (5 Cir. 1970); *Richardson* v. *MacArthur*, 451 F.2d 35, 41 (10 Cir. 1971); *Mader* v. *Armel*, 461 F.2d 1123, 1126 (6 Cir. 1972). Indeed, the Court of Appeals, in affirming the District Court's dismissal of BPC's action against CCI which was part of the consolidated appeal below, repeatedly applied the "clearly erroneous" test to the findings there. See, *e.g.*, Jt. App. H-73, H-76.

Certiorari should be granted in these circumstances to review not merely the questions of law under Section 14(e) discussed above but also their application to the facts of

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* Indeed, if CCI did intend to achieve control on its cash tender offer, its offer was patently misleading and far more "culpable" than calling the limited offer it made "inadequate."

** For example, the Court of Appeals majority fully accepted the testimony of CCI's witness Gordon (Jt. App. H-61-62) which the trial court found "not worthy of belief" (Jt. App. G-13) and which the dissenting Court of Appeals judge thoroughly discredited (Jt. App. H-113-115).

this case. This need is particularly acute in light of the trial court's judgment for defendants after a full trial, which a majority of the Court of Appeals panel reversed in blatant derogation of the "clearly erroneous" rule and without giving the trial court the right to determine the remedies on remand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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July 20, 1973

Certificate of Service

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari were served by hand this 20th day of July on Arthur L. Liman, Esq. 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: July 20, 1973

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